

1 HUBEL, United States Magistrate Judge:

2 The plaintiff Estelle Lynn Finney brought this action for
3 judicial review of the Commissioner's decision denying her
4 applications for disability insurance benefits under Title II of
5 the Social Security Act, 42 U.S.C. § 1381 et seq., and
6 Supplemental Security Income under Title XVI of the Act. In
7 Findings and Recommendation entered July 8, 2011, I recommended
8 that the Commissioner's decision be reversed, and the case be
9 remanded for further proceedings. Dkt. #18. Neither party
10 filed objections, and on August 1, 2011, Judge Malcolm F. Marsh
11 accepted my recommendation and entered judgment for Finney.
12 Dkt. ##20 & 21.

13 The parties stipulated to a fee payment under the Equal
14 Access to Justice Act, 28 U.S.C. § 2412 (EAJA), in the amount of
15 \$4,149.38. On November 14, 2011, Judge Marsh granted the
16 motion, ordering payment to the plaintiff of EAJA fees in the
17 amount of \$4,149.38. Dkt. #28.

18 The matter now is before the court on the plaintiff's
19 unopposed motion for attorneys' fees pursuant to 42 U.S.C.
20 § 406(b). Dkt. #29. Section 406(b) provides that an attorney
21 who represents a successful claimant in a Social Security action
22 may be awarded, as part of the judgment, "'a reasonable fee . .
23 . not in excess of 25 percent of the . . . past-due benefits'
24 awarded to the claimant." *Gisbrecht v. Barnhart*, 535 U.S. 789,
25 795, 122 S. Ct. 1817, 1822, 152 L. Ed. 2d 996 (2002) (quoting 42
26 U.S.C. § 406(b)(1)(A)). The attorney's fee "is payable 'out of,
27 and not in addition to, the amount of [the] past-due benefits.'" *Id.*
28 An attorney may receive fees under both EAJA and section

1 406(b), but the attorney must refund the amount of the smaller
2 fee to the claimant. *Id.* (citation omitted). This ensures the
3 claimant receives the largest possible award of benefits. *Id.*

4 The *Gisbrecht* Court observed that contingent fee contracts
5 "are the most common fee arrangement between attorneys and
6 Social Security claimants." *Id.*, 535 U.S. at 800, 122 S. Ct. at
7 1824 (citation omitted). To prevent an attorney from
8 contracting for an unreasonably large fee, Congress enacted
9 section 406(b) to limit the attorney's fee to 25 percent of the
10 past-due benefits. *Id.*, 535 U.S. at 805, 122 S. Ct. at 1826-27
11 (discussing the legislative history behind section 406(b)).
12 However, the statute does not mandate that an attorney receive
13 25 percent of the claimant's past-due benefits. Rather,
14 "[w]ithin the 25 percent boundary, . . . the attorney for the
15 successful claimant must show that the fee sought is reasonable
16 for the services rendered." *Id.*, 535 U.S. at 807, 122 S. Ct. at
17 1828. Thus, although the district court must look first to the
18 contingent fee agreement between the attorney and the claimant,
19 the court then must test the fee arrangement for reasonableness.
20 *Crawford v. Astrue*, 586 F.3d 1142, 1149 (9th Cir. 2009) (citing
21 *Gisbrecht*, 535 U.S. at 808, 122 S. Ct. at 1828).

22 The amount of the fee may be reduced "based on the character
23 of the representation and the results the representative
24 achieved." *Gisbrecht*, 535 U.S. at 808, 122 S. Ct. at 1828
25 (citations omitted). Thus, for example, a reduced fee would be
26 in order "if the attorney provided substandard representation or
27 engaged in dilatory conduct in order to increase the accrued
28 amount of past-due benefits, or if the 'benefits are large in

1 comparison to the amount of time counsel spent on the case.'" *Crawford*, 586 F.3d at 1148 (quoting *Gisbrecht*, *supra*). The
2 attorney ultimately "bears the burden of establishing that the
3 fee sought is reasonable." *Id.*

4
5 Routine rubber-stamping of the statutory maximum allowable
6 fee is disfavored in these cases. As the Fourth Circuit Court
7 of Appeals observed over forty years ago,

8 [J]udges should constantly remind themselves
9 that, while the lawyer is entitled to a
reasonable compensation for the services
10 rendered by him in the judicial proceeding,
these benefits are provided for the support
11 and maintenance of the claimant and his [or
her] dependents and not for the enrichment
12 of members of the bar. Routine approval of
the statutory maximum allowable fee should
13 be avoided in all cases. In a great
majority of the cases, perhaps, a reasonable
14 fee will be much less than the statutory
maximum. The statute directs a
15 determination and allowance of a reasonable
fee and the courts are responsible under the
16 [Social Security] Act for seeing that
unreasonably large fees in these Social
17 Security cases are not charged or collected
by lawyers.

18 *Redden v. Celebrezze*, 370 F.2d 373, 376 (4th Cir. 1966)

19 In the present case, the fee agreement between the plaintiff
20 and her counsel provides for a fee equal to 25 percent of past-
21 due benefits. See Dkt. #30-3. Counsels' efforts resulted in an
22 award of "approximately \$47,980 in total retroactive benefits,
23 plus monthly benefits of at least \$828 until she reaches her
24 full retirement age or is no longer disabled." Dkt. #30, p. 1.
25 Thus, the contracted-for attorney's fee would be \$11,995.00 -
26 the amount sought in the present motion. After deduction/refund
27
28

1 of the \$4,149.38 fee awarded under EAJA, the requested fee would
2 result in an out-of-pocket amount for Finney of \$7,845.62.

3 The time records submitted with the plaintiff's motion
4 indicate that attorney Kathryn Tassinari expended 23.55 hours in
5 this case (17.05 hours in 2010; 6.50 hours in 2011). An
6 expenditure of 23.55 hours falls within the twenty to forty hour
7 range Judge Michael W. Mosman found to be a "reasonable amount
8 of time to spend on a social security case that does not present
9 particular difficulty." *Harden v. Comm'r*, 497 F. Supp. 2d 1214,
10 1215 (D. Or. 2007) (noting "some consensus among the district
11 courts" on this point; citing cases). Judge Mosman agreed that
12 "[a]bsent unusual circumstances or complexity, . . . this range
13 provides an accurate framework for measuring whether the amount
14 of time counsel spent is reasonable." *Id.* In the present case,
15 the administrative record was 381 pages long. The plaintiff's
16 opening brief was nineteen pages long, and raised four issues
17 requiring analysis of the evidence and applicable law related to
18 the ALJ's evaluation of the evidence. After review of the
19 Commissioner's ten-page brief, the plaintiff filed a six-page
20 reply. The attorneys' time records indicate the time expended
21 by counsel in this case was reasonable, and the court so finds.

22 A fee of \$11,995 for 23.55 hours of work would result in an
23 effective hourly rate of \$509.34. Counsel states she "normally
24 works on a contingent basis and thus does not have a normal
25 hourly billing rate." Dkt. #30, p. 4. To demonstrate that the
26 requested fee is reasonable, counsel refers to the "Oregon State
27 Bar 2007 Economic Survey," used by judges in this court as a
28 benchmark in determining reasonable hourly rates for attorney

1 fee awards. The survey reports that attorneys practicing in
2 "other areas" of private practice in Portland bill at an average
3 rate of \$244.00 per hour. Counsel argues for an upward
4 adjustment of the average hourly rate based on the risk of
5 representing Social Security claimants, and the fact that
6 although "Portland attorneys spend 15% of their time on
7 contingency matters," they "derive 17% of their income from such
8 matters," thereby "mak[ing] up in contingency-enhanced rates for
9 the time they spend on contingency cases they lose (by a factor
10 of 17/15)." Dkt. #3, p. 4. Counsel asserts, without citation
11 to authority, that "[i]n Social Security court cases, there is
12 only a 33.52% chance of winning benefits for the claimant." *Id.*
13 She therefore applies "a contingency multiplier of 2.98
14 (100/33.52)," for purposes of offsetting the risk of non-
15 payment. *Id.*, p. 5. Applying the contingency multiplier of
16 2.98, and the contingency loss factor of 17/15, to the \$244
17 hourly rate, counsel arrives at an hourly rate of \$824.07. She
18 argues this rate is "averaged across all cases in which § 406(b)
19 fees are awarded, which would properly compensate Plaintiff's
20 attorney for the risk of non-payment due to contingency, and put
21 her on equal footing with the average attorney in the Portland
22 area who takes contingency cases." *Id.*

23 In considering identical arguments made by attorneys seeking
24 section 406(b) fees in previous cases, the undersigned has noted
25 that this type of analysis does little to assist the court in
26 determining the reasonableness of the contracted-for fee equal
27 to 25% of the claimant's past-due benefits. This analysis is
28 based on a lodestar approach, which was "flatly rejected" by the

1 Supreme Court in *Gisbrecht*. See *Crawford*, 586 F.3d at 1148.
2 The *Crawford* court explained that under *Gisbrecht*, the court's
3 duty to assure the reasonableness of the fee "must begin . . .
4 with the fee agreement, and the question is whether the amount
5 need be reduced, not whether the lodestar amount should be
6 enhanced." *Id.*, 586 F.3d at 1149. The court may "consider the
7 lodestar calculation, but *only as an aid* in assessing the
8 reasonableness of the fee." *Id.*, 586 F.3d at 1151 (emphasis in
9 original; citing *Gisbrecht*, 505 U.S. at 808, 122 S. Ct. at
10 1828). Factors to be considered in reducing a fee include
11 "substandard performance, delay, or benefits that are not in
12 proportion to the time spent on the case." *Id.* Importantly,
13 however, this is not a definitive list of factors the court may
14 consider. For example, the *Crawford* court directed district
15 courts to "look at the complexity and risk involved in the
16 specific case at issue to determine how much risk the [attorney]
17 assumed in taking the case." *Crawford*, 586 F.3d at 1153.

18 In the present case, counsel's representation of the
19 claimant was not substandard. She reviewed the administrative
20 record and the Commissioner's arguments thoroughly, and prepared
21 twenty-five pages of briefing that ultimately carried the day.
22 The court finds no reduction of the fee is warranted based on
23 counsel's representation. The court also finds counsel did not
24 engage in dilatory conduct in order to increase the accrued
25 amount of past-due benefits, so no downward adjustment is
26 required on that basis. See *Gisbrecht*, 535 U.S. at 808, 122 S.
27 Ct. at 1828.

1 The court next considers whether "the benefits are large in
2 comparison to the amount of time the attorney spent on the
3 case." *Id.* The 23.55 hours of work performed by Finney's
4 counsel resulted in an award of \$47,980 in retroactive benefits,
5 plus ongoing monthly benefits until Finney reaches retirement
6 age or no longer is disabled. Counsel will not receive a
7 percentage of Finney's future benefits that also result from
8 counsel's representation. The court finds the amount of benefits
9 awarded to Finney was not "'large in comparison to the amount of
10 time counsel spent on the case,'" and no "'downward adjustment
11 is . . . in order.'" *Province v. Comm'r*, slip op., 2013 WL
12 3045568, at *2 (D. Or. June 17, 2013) (Marsh, J.) (quoting
13 *Gisbrecht*, 535 U.S. at 808, 122 S. Ct. at 1828).

14 Finally, the court considers the complexity of the case, and
15 counsel's risk of non-payment. The issues counsel raised on
16 Finney's behalf were fairly routine in Social Security cases.
17 However, the ALJ's errors identified by the court were subtle,
18 rather than glaring, and the outcome of the case was far from
19 assured. In addition, as Judge Marsh observed in *Province*, "it
20 takes an experienced practitioner and a close examination of the
21 relevant documents and records to effectively identify any
22 insufficiencies in the administrative record." *Id.* Further, a
23 significant lapse of time often occurs between counsel's
24 acceptance of the case and the receipt of payment. The present
25 case was filed more than three years ago, in February 2010. It
26 could be several more months before counsel receives payment of
27 any fees awarded pursuant to the current motion. In taking the
28 case, counsel assumed the significant "risk that no benefits

1 would be awarded or that there would be a long court or
2 administrative delay in resolving the case[]." *Crawford*, 586
3 F.3d at 1152. The court finds no reduction of the requested fee
4 is warranted based on the risk and complexity of the case.

5 In summary, after considering all of the relevant factors,
6 the court finds Finney's counsel has demonstrated that a 25% fee
7 is reasonable in this case. The Commissioner agrees, offering
8 no opposition to counsel's motion.

9 10 **CONCLUSION**

11 For the reasons set forth above, I recommend the plaintiff's
12 counsel's motion for attorney fees pursuant to 42 U.S.C. §
13 406(b) (Dkt. #29) be granted, and a fee of \$11,995 be awarded,
14 with the sum of \$4,149.38, representing EAJA fees already
15 awarded in this case, to be refunded to the plaintiff.

16 17 **SCHEDULING ORDER**

18 These Findings and Recommendations will be referred to a
19 district judge. Objections, if any, are due by **October 7, 2013**.
20 If no objections are filed, then the Findings and
21 Recommendations will go under advisement on that date. If
22 objections are filed, then any response is due by **October 24**,

1 **2013.** By the earlier of the response due date or the date a
2 response is filed, the Findings and Recommendations will go
3 under advisement.

4 IT IS SO ORDERED.

5 Dated this 17th day of September, 2013.

6
7 /s/ Dennis J. Hubel

8 Dennis James Hubel
9 Unites States Magistrate Judge